Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1997

SOFIA E. FOWLER,

Petitioner,

v.

THE BOARD OF COUNTY COMMISSIONERS OF POTTAWATOMIE COUNTY, OKLAHOMA,

Respondent.

On Petition For Writ Of Certiorari To The Oklahoma Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Oklahoma Supreme Court apply the Governmental Tort Claims Act unconstitutionally, and in conflict with relevant decisions of this Court, by making the Board of County Commissioners of Pottawatomie County immune from liability for an act that does not fit into the immunities listed in the statute?

II. Did the Oklahoma Supreme Court err in holding that summary adjudication was proper when Petitioner was denied her Oklahoma Art. II § 30 Constitutional and United States Constitutional Fourth Amendment right to protection from an unreasonable search and seizure, a right she is entitled to under the Fourteenth Amendment to the United States Constitution?

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OPINIONS BELOW

The opinions below of the Oklahoma Supreme Court, Memorandum Opinion of the Oklahoma Court of Appeals and the Judgment of the District Court of Pottawatomie County, State of Oklahoma have not been reported. The Oklahoma Supreme Court's denial of Petitioner's Petition for a Writ of Certiorari and Dissenting Opinion has been reprinted in the Appendix at App. 1. The Memorandum Opinion of the Oklahoma Court of Appeals has been reprinted in the Appendix at App. 5. The Judgment of the District Court of Pottawatomie County, State of Oklahoma granting Summary Judgment to the Defendant/Respondent has been reprinted in the Appendix at App. 12.

JURISDICTION

The Oklahoma Supreme Court Decision to be reviewed was entered June 5, 1998. (See Full Text at App. 1). Jurisdiction is provided under 23 U.S.C. § 1257(a), which confers on this Court jurisdiction to review on a Writ of Certiorari final judgments or decrees rendered by the highest court of a State in which a decision could be had, in this case the Oklahoma Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the following constitutional provisions and statutes: U.S. Const. Amend. IV and XIV; 28 U.S.C. §§ 2674 and 2679; 51 O.S. §§ 152.1, 153, and 155.

The above named constitutional provisions and statutes are fully reprinted in the Appendix.

STATEMENT OF THE CASE

This Petition relates to the negligent, illegal acts of Reserve Deputies for the Pottawatomie County Sheriff's Department. Although the Reserve Deputies were suspended and eventually terminated because of their illegal search of Petitioner's vehicle, the Pottawatomie County Board of Commissioners is incorrectly claiming immunity under the Governmental Tort Claims Act. The issues involve the constitutionality of Oklahoma's application of the Governmental Tort Claims Act and the denial of Petitioner's right to protection from unreasonable search and seizure for which she is entitled to due process and equal protection of the law.

Factual Background

On March 12, 1996, David J. Fowler (Fowler), estranged husband of the Petitioner, contacted a Deputy from the Pottawatomie County Sheriff's Department and told him that the Petitioner was doing drugs and had drugs in her vehicle. Fowler wanted "someone to come out and stop her and find the drugs, then take the children from her." The Deputy told Fowler that his statement alone was not probable cause to stop the Petitioner and search the vehicle. On three occasions Fowler made contact with a Reserve Deputy in an effort to get someone to stop, search and arrest the Petitioner.

On March, 15, 1996 at approximately 8:00 p.m., employees of the Pottawatomie County Sheriff's Department unlocked Petitioner's vehicle and conducted a search. At this time, Petitioner's car was located at the home of her estranged husband David Fowler, who had invited her out for one last dinner and insisted upon driving his car, and leaving the Petitioner's vehicle at Fowler's Residence. The Reserve Deputy unlocked Petitioner's vehicle without Petitioner's consent and without a warrant and searched the vehicle. Drugs were not found during search number one (1). The Reserve Deputy without consent or a search warrant, conducted a second search, and located a bag of what looked to be drugs in the trunk area. The Reserve Deputy placed the drugs back in the trunk and re-locked the Petitioner's vehicle.

At approximately 9:00 p.m., the Reserve Deputies returned to the vehicle and conducted a third search, again without Petitioner's consent or a search warrant. The purported "drugs" were located and again the vehicle was re-locked with the "drugs" left in the trunk. Later in the evening one of the Reserve Deputies received a telephone call from Fowler wherein Fowler, estranged husband of the Petitioner, advised him that the Petitioner was intoxicated and that the probable cause they needed to pull her over would be a faulty tail light. The Reserve Deputy set out in search of the Petitioner. The Reserve Deputy followed the Petitioner for approximately 6½ miles and did not observe any behavior that would be consistent with drunk driving. The Reserve Deputy did notice that a tail light was out but continued to follow the Petitioner's vehicle before deciding for what offense he was going to stop her. The Reserve Deputies stopped

Petitioner's vehicle at approximately 1:30 a.m. on March 16, 1996, in a dark and remote area and administered a field sobriety test. After passing the field sobriety test, the Reserve Deputy advised the Petitioner to open the trunk so he could search the Petitioner's vehicle for drugs, narcotics and alcohol.

The Reserve Deputies' alleged probable cause for stopping and searching the Petitioner's vehicle was based upon information received from Fowler and the three prior searches of the vehicle, not anything the Petitioner had done. The "drugs" were found once again, and seized. After a considerable period the Petitioner was released to go and was advised the matter would be turned over to the District Attorney for prosecution.

History of the Litigation

The Petitioner alleged in her Petition that Reserve Deputies, while acting within the scope of their employment as Reserve Deputies for the Pottawatomie County Sheriff's Department, unlawfully stopped, without probable cause, and searched Petitioner's vehicle; invaded Petitioner's right to privacy; all constituting the torts of false arrest and false imprisonment; and that the Pottawatomie County Sheriff's Department failed to properly train and supervise their employees.

The Defendant Board filed a Motion for Summary Judgment which the Court sustained. The Oklahoma Court of Appeals affirmed the decision of the District Court, and in a five to four plurality decision, the Oklahoma Supreme Court denied the Petitioner's Petition for a Writ of Certiorari.

This Petition seeks review of the Oklahoma decision because it is granting immunity for acts not allowed for in the state statute; and additionally, because Petitioner was denied her Oklahoma Art. II § 30 Constitutional right and Fourth Amendment to the United States Constitutional right to protection from an unreasonable search and seizure, for which she is entitled to due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING CERTIORARI

This Court should grant certiorari in this case for the following two reasons:

1. **The Oklahoma Supreme Court has acted with unbridled discretion in granting immunity to the Board of County Commissioners of Pottawatomie County Oklahoma by applying the Governmental Tort Claims Act unconstitutionally and in conflict with relevant decisions of this Court.**

2. **The Oklahoma Supreme Court has in effect decided that Petitioner is not entitled to due process and equal protection of the law under the Fourteenth Amendment by not granting her protection and recourse from an unreasonable search and seizure; as well as denying Petitioner of her Oklahoma Constitutional rights to protection from unreasonable search and seizure (Art. II § 30) and her right to trial by jury (Art. II § 19).**

By making this ruling, the Oklahoma Supreme Court has denied Petitioner of the Oklahoma and United States

Constitutional rights and protections; and made a decision which "conflicts with relevant decisions of this Court."

PROPOSITION I: THE GOVERNMENTAL TORT CLAIMS ACT DOES NOT PROVIDE IMMUNITY FROM LIABILITY FOR A CLAIM WHICH DOES NOT RESULT FROM THE EXEMPTIONS SET FORTH IN THE STATUTE.

By affirming the trial court's granting of summary judgment against the Petitioner, the Oklahoma Supreme Court has essentially re-written the Governmental Tort Claims Act to provide sovereign immunity to governmental entities for *any and all* acts of its police officers. If this decision is allowed to stand, the Oklahoma Supreme Court will have unbridled discretion in granting immunity to Oklahoma governmental entities. Consequently, individual citizens will continue to be divested of their fundamental constitutional rights by government officers and entities, with no available recourse.

The Governmental Tort Claims Act is the exclusive remedy for an injured plaintiff to recover against a government entity for its negligence. *Rout v. Crescent Public Works Authority, Okla.*, 878 P.2d 1045 (Okla. 1994). Therefore, the Governmental Tort Claims Act is the exclusive remedy available for the Petitioner to recover for her injuries received as a result of the negligent acts of the Pottawatomie County Reserve Deputy Sheriffs.

The Federal Tort Claims Act makes the United States liable (with certain exemptions) for the negligence of its employees. *Rayonier Incorporated v. United States*, 352 U.S.

315, 318, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957) In the same manner, the Governmental Tort Claims Act makes the Oklahoma government entity liable (with certain exemptions) for the negligence of its employees. The Tort Claims Acts of the Federal Government and Oklahoma, list the specific acts for which the government entity will be immune from liability. (See 51 O.S. § 155 at App. 23 and 28 U.S.C. § 2679 at App. 17) Both of the statutes are very clear that the United States', the States', and Municipalities' immunity to suit is waived with the exception of the specifically enumerated exemptions. Consequently, if the act which gives rise to a law suit does not fit into one of the statutory exemptions, then the government is not immune from liability.

Decisions

There are numerous other federal and state cases which have resulted in the courts emphasizing the limits on governmental immunity. In *Taylor v. City of Oklahoma City*, 914 P.2d 1073, 1075 (Okla. Ct. App. 1995) the court noted that the "exceptions to liability are now exclusively enumerated in § 155." The *Taylor* Court citing *Kish v. City of Oklahoma City*, 859 P.2d 1131, 1133 (Okla. Ct. App. 1993), also stated that "Statutory exceptions should be strictly construed to the end that the exception does not 'devour' the general policy which the law, in this case the Act, embodies." *Taylor* at 1075. Furthermore, in *Sullivant v. City of Oklahoma City*, 940 P.2d 220, 222 (Okla. 1997) the Oklahoma Supreme Court stated that pursuant to the Governmental Tort Claims Act, the state waives its sovereign immunity as to tort claims with the exception of the specifically enumerated exemptions listed in the act.

These Oklahoma cases are evidence of the fact that the courts will only grant immunity to the government agency if the tortious act is one of the specifically enumerated exemptions listed in § 155 of the statute.

Likewise, the United States Supreme Court and numerous federal courts have interpreted the Federal Tort Claims Act in the same manner. As this Court noted, the very purpose of the Tort Claims Act was to waive the all-encompassing immunity that was traditionally granted to the Government. *Rayonier* at 319. *See Mullins v. First National Exchange Bank of Virginia,* 275 F. Supp. 712 (W.D.Va. 1967) (stating that the "effect of the Tort Claims Act was to restrict the waiver of sovereign immunity as to tort actions against the United States to those cognizable under the Act.) In *Feres v. United States,* 340 U.S. 135, 140, 71 S.Ct. 153, 95 L.Ed. 152, (1950) this Court held that the primary purpose of the Tort Claims Act is to provide a remedy to those who had been without a remedy because their claim was against the government rather than against a private citizen. Congress passed the Tort Claims act to waive the government's sovereign immunity and to provide private citizens with a remedy against the government for the claims that are not among the statutorily listed exemptions. *Feres* at 140.

When the Oklahoma Legislature passed the Governmental Tort Claims Act, it waived the governmental sovereign immunity in all cases except for those involving one of the thirty (30) exemptions listed in the statute. *Anderson v. Eichner, Okla.,* 890 P.2d 1329, 1338 (Okla. 1994). When passing the Governmental Tort Claims Act, the Legislature's intent was to only provide government

immunity when the claim resulted from one of the thirty (30) specified acts. *Anderson* at 1338.

The exemptions listed in the Governmental Tort Claims Act do apply to policy making and decisions. *Randell v. Tulsa Independent School Dist. No. 1*, 889 P.2d 1264, 1267 (Okla. Ct. App. 1994). However, the *Randell* Court held that the exemptions *do not apply to negligent performance* of policy. *Randell* at 1267. (Emphasis added.)

In the case at bar, the two Deputy Sheriffs negligently performed and abused their police power and authority to perform duties according to the standard police policies. The Governmental Tort Claims Act does not shield the Respondent from liability for the negligent job performance of its employees. The Oklahoma and Federal statutes waive sovereign immunity and permit actions in tort against both state and federal governments and their respective governmental agencies. Oklahoma as well as Federal Courts have continuously held that the Tort Claims Acts do not provide immunity for claims which are not specifically enumerated in the statutes.

The purpose of both the Federal and the Oklahoma Governmental Tort Claims Acts, to waive sovereign immunity, is clearly set forth in the statutes. The statutes specifically state the areas in which the government is immune from liability, and also state the government will not be immune from claims that are not enumerated in the statutes. (See 28 U.S.C. § 2679 at App. 17 and 51 O.S. §§ 152.1(B) at App. 21 and 155 at App. 23) Oklahoma courts have continuously interpreted the Governmental Tort Claims Act in the same manner as this Court and Federal courts have interpreted the Federal Tort Claims

Act. However, in the case at bar, by letting the Summary Judgment in favor of Respondent stand, the Oklahoma courts have interpreted the Governmental Tort Claims as providing immunity beyond the limitations set forth in the statutes and have infringed upon Petitioner's Constitutional rights and privileges. This decision is unconstitutional and conflicts with relevant decisions of this Court.

SUBPROPOSITION IA: THE NEGLIGENT ACTS OF THE DEPUTY SHERIFFS DO NOT FIT IN THE STATUTORY EXEMPTION OF "failure to provide, or the method of providing, police, law enforcement or fire protection;" THEREFORE THE RESPONDENT IS NOT ENTITLED TO IMMUNITY FROM LIABILITY.

The statutory exemption that is disputed in this case is found at 51 O.S. § 155(6) and states:

> The state or a political subdivision shall not be liable if a loss or claim results from:
>
> 6. Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection.

The Respondent is not entitled to immunity under 51 O.S. § 155(6). This statutory exemption is not applicable because there is no evidence, nor is Petitioner alleging, that this incident was the result of any "civil disobedience, riot, insurrection or rebellion." Furthermore, Petitioner never did, nor is she now, alleging that her injuries were the result of the "failure to provide, or method of providing police, law enforcement or fire protection." Therefore, the Respondent is not immune from liability under the Governmental Tort Claims Act. This rule is

clearly stated in *Overall v. State ex rel. Dept. of Public Safety*, 910 P.2d 1087, 1092 (Okla. Ct. App. 1995). The *Overall* Court held that § 155(6) was inapplicable because there was no evidence of civil disobedience, riot, insurrection or rebellion, the plaintiffs were not alleging that the incident was a result of the failure or method of providing police protection, and the plaintiffs never disputed that the officers were acting in good faith within the scope of employment. *Overall* at 1093.

As Alma Wilson, Oklahoma Supreme Court Justice, stated in her dissent to the denial of Writ of Certiorari to the Oklahoma Supreme Court:

> "Appellant's action does not arise out of the 'method of providing law enforcement.' It arises out of incidences of alleged abuse of police power. In particular, it arises out of the alleged incidence where appellant was allegedly being detained 'without due and legal process.' This cause involves questions of fact, as well as questions of law. Summary adjudication is not proper."

(See Full Text of Dissenting Opinion at App. 2)

Governmental entities are liable for certain negligent acts of government employees, done within the scope of employment. 51 O.S. §§ 153, 155 and 28 U.S.C. § 2674. The Deputy Sheriffs, who were employees of Respondent, were negligent in their employment duties on the night they conducted four (4) unlawful searches of Petitioner's vehicle; by stopping Petitioner without probable cause; and by subjecting Petitioner to a field sobriety test without probable cause. The Reserve Deputies were negligent in all of their actions and as a result, they were both

suspended and ultimately terminated for this illegal search. (See Deposition of Ex-Reserve Deputy Hurley page 100 lines 1-8 at App. 28 and Deposition of Ex-Reserve Deputy Fowler page 47 lines 3-22 at App. 30)

Performing traffic stops and searching vehicles are within the parameters of "scope of employment" for the Reserve Deputy; however, negligently performing these duties does not fall under any of the specifically enumerated exemptions which would relieve the government of liability. *See Randell v. Tulsa Independent School Dist. No. 1*, 889 P.2d 1264, 1267 (Okla. Ct. App. 1994) (noting that negligent performance of school policies is not protected by the Governmental Tort Claims Act). The actions of these Reserve Deputies was an excessive abuse of the state police power to regulate for the health safety and welfare of its citizens. These officers negligently abused the police powers that fall within the scope of their employment.

In *Sullivant v. City of Oklahoma City*, 940 P.2d 220, 223 (Okla. 1997) the Oklahoma Supreme Court held that cities may not rely upon the exemptions from liability in the Governmental Tort Claims Act if the police failed to follow the requirements of the law. In *Sullivant*, because the police officers failed to follow proper statutory procedures, their entry for a seizure "would not have been authorized by law and the execution of the search warrant would not have been lawful". *Sullivant* at 223. Consequently, the *Sullivant* Court would not allow the city to assert immunity under the Governmental Tort Claims Act.

In the case at bar, the Reserve Deputies negligently conducted searches of Petitioner's car. Consequently, the Respondent should not be allowed to shield itself with all encompassing immunity for the negligent acts of its employees.

This Court, numerous Federal Courts and Oklahoma courts have continuously held that the Tort Claims Act only grants immunity for the specifically enumerated exemptions set forth in the statutes. This Court has continually interpreted the Tort Claims Act narrowly, only providing immunity where it is clearly warranted by the statute. Although this is also what the Oklahoma Governmental Tort Claims Act statute states is proper, in the case at bar the Oklahoma Courts have provided complete immunity to Respondent for the negligent acts of its employees. By stating that the Respondent is entitled to immunity, the Oklahoma Courts are granting immunity for tortious conduct which is not protected by statute.

To let the decision of the Oklahoma Court stand, Respondent would be given immunity from depriving Petitioner of her Constitutional rights, protections and privileges. Petitioner would have no recourse and Respondent would be given complete immunity for its tortious conduct, which does not fall within the parameters of the exemption granting immunity for "the failure to provide or the method of providing police, law enforcement or fire protection."

SUBPROPOSITION IB: THIS COURT AND THE OKLAHOMA SUPREME COURT, AS WELL AS FEDERAL AND OKLAHOMA STATE STATUTES, HAVE ALREADY SET THE TEST FOR DETERMINING LIABILITY OF ACTS THAT ARE NOT IN THE STATUTORILY LISTED EXEMPTIONS. THE OKLAHOMA SUPREME COURT HAS DISREGARDED THIS STANDARD.

In all relevant circumstances, 28 U.S.C. § 2674 and 51 O.S. § 153 are the same. (See 28 U.S.C. § 2674 at App. 16 and 51 O.S. § 153 at App. 22) They both set the test for determining the liability of the government for acts of its employees that are not among the enumerated exemptions. Both the federal and state statutes express the intent that if the tortious act does not fall within one of the enumerated exemptions, then the government will be liable for the act if a private citizen would be liable for the same act.

The federal statute, 28 U.S.C. § 2674 in relevant part states: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances". Likewise, the Oklahoma Statute 51 O.S. § 153(A) in relevant part states: "The state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees . . . if a private person or entity, would be liable for money damages under the laws of the state."

This Court stated in *Indian Towing Company v. United States*, 350 U.S. 61, 68, 76 S.Ct. 122, 100 L.Ed. 48 (1955) that the "broad and just purpose which the statute was

designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws." This Court also held that the language in § 2674 which states " . . . in the same manner and to the same extent as a private individual under like circumstances . . . " must be interpreted to include liability in the performance of those government activities which private persons do not perform. *Indian Towing Co.* at 63.

This test, for determining governmental liability, was again interpreted by this Court in *United States v. Muniz*, 374 U.S. 151, 83 S.Ct. 1850, 10 L.Ed.2d 805. This Court noted that the test is clearly stated in the statutes and held that whether or not a claim could be made out against the government "would depend on whether a private individual under like circumstances would be liable under state law". *Muniz* at 153. This Court has expressed that this statute does not create a new cause of action; it is the "acceptance of liability under circumstances that would bring private liability into existence." *Feres* at 141.

The language and Supreme Court interpretations of § 2674 of the Federal Tort Claims Act are the same in all relevant circumstances as the language and court interpretations of § 153 of the Oklahoma Governmental Tort Claims Act. In *Anderson v. Eichner, Okla.*, 890 P.2d 1329, 1336 (Okla. 1994) the Oklahoma Supreme Court stated that § 153 "extends governmental accountability to all torts for which a private person or entity would be liable". Again in *Nguyen v. State*, 788 P.2d 962, 964 (Okla. 1990) the Oklahoma Supreme Court stated that the scope

of liability in § 153 is torts "committed within the scope of employment where private persons or entities would be liable under the laws of this state".

Under current laws in Oklahoma, a private citizen is not entitled to invade the privacy of another individual without cause. Following the reasoning of the Oklahoma Supreme Court and this Court, if a private individual cannot invade the privacy of another individual, then likewise an officer of the state cannot invade the privacy of another individual without probable cause. Invading the Constitutional right of a citizen is not among the exemptions from liability in either the Federal Tort Claims Act or the Governmental Tort Claims Act. Therefore, the Respondent cannot claim immunity for the tortious acts of its employees. Furthermore, the Oklahoma Courts have failed to follow the test set forth in the statute and case law which state that liability of the government for claims not among the statutory exemptions is the same as liability of a private citizen under the same circumstances and laws of the state.

PROPOSITION II: BY ALLOWING THE SUMMARY JUDGMENT TO STAND, THE OKLAHOMA SUPREME COURT HAS DENIED THE PETITIONER OF HER FUNDAMENTAL RIGHT TO PROTECTION FROM AN UNREASONABLE SEARCH AND SEIZURE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner has a vested right to protection from an unreasonable search and seizure. The Fourth Amendment to the United States Constitution states in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(See Full Text of Amendment at App. 14)

The very purpose of the Fourth Amendment, as stated in countless decisions of this Court, "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

Furthermore, the Constitution of the United States in Section I of the Fourteenth Amendment provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(See Full text of Amendment at App. 14)

This Court has continually held that protection from unreasonable searches and seizures is essential to liberty; and therefore, the state, under the Fourteenth Amendment to the United States Constitution, cannot impede upon this right without due process and equal protection of the laws. Furthermore, the Fourth Amendment is enforceable against the states through the Fourteenth

Amendment. *Camara* at 528, citing *Kerr v. State of California*, 374 U.S. 23, 29, 83 S.Ct. 1623, 10 L.Ed.2d 726. Consequently, Petitioner has the Constitutionally vested right to be protected from an unreasonable search and seizure by Oklahoma officers. In *Soldal v. Cook County, Illinois, et al.*, 506 U.S. 56, 62, 113 S.Ct. 538, 544, 121 L.Ed.2d 450 (1992) this Court held that the Fourth Amendment also protects an individual's privacy. The *Soldal* Court, citing numerous other decisions of this Court, stated that a 'search' occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed". *Soldal* at 63. The Court, also noted that the "principal" objective of the Fourth Amendment is to protect the privacy of an individual and that the shift in emphasis from property to privacy has come from substantive and procedural reform. *Soldal* at 64, citing *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), and *Silverman v. United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961).

Petitioner was subjected to an unreasonable and unlawful search and seizure. Petitioner's privacy as well as her property was invaded. Petitioner was followed by the Deputy Sheriffs for more than six (6) miles before she was stopped, subjected to a sobriety test for no cause and then her car was searched without warrant or probable cause. (See Deposition of Ex-Reserve Deputy Hurley page 100 lines 1-8 at App. 28 and Deposition of Ex-Reserve Deputy Fowler page 47 lines 3-22 at App. 30) Petitioner's car was searched without a warrant, without probable cause and without Petitioner's knowledge, presence or consent. The unreasonableness of this search and seizure

was evidenced by the fact that the two Reserve Deputies were suspended and eventually terminated. Both Deputy Sheriffs admitted in depositions that the reason they were terminated was for conducting an illegal search of Petitioner's car. (See Deposition of Ex-Reserve Deputy Hurley page 100 lines 1-8 at App. 28 and Deposition of Ex-Reserve Deputy Fowler page 47 lines 3-22 at App. 31)

By letting the Summary Judgment in favor of Respondent stand, the Oklahoma Courts have denied Petitioner of her fundamental, Constitutionally vested right to protection from an unreasonable search and seizure. The Oklahoma Courts have held the state government agencies and their employees to be above the law, and further have granted the government employees the ability to unlawfully violate private citizens' fundamental rights.

CONCLUSION

In the opinions sought to be reviewed, the Oklahoma Courts have denied Petitioner of (1) her statutory right to recover against the government for a claim not specifically excluded by statute; and, (2) her fundamental, Constitutionally vested right to protection from an unreasonable search and seizure. If the Oklahoma decision is allowed to stand, it will allow Oklahoma Courts to continue to unlawfully and unconstitutionally grant immunity to itself and allow the government to be immune from invading the Constitutional rights of private citizens. Furthermore, the Oklahoma Courts will continue to expand governmental immunity in an unconstitutional

manner, granting sovereign immunity to government agencies for claims not listed among the exemptions in the Governmental Tort Claims Act.

These issues must be addressed by this Court to require not only Oklahoma Courts but all state courts to follow the legislative intent of the Governmental Tort Claims Acts, to interpret the Acts Constitutionally, and to stop infringing upon the rights of individuals. These issues must also be addressed by this Court to protect the vested rights of due process afforded citizens of the United States, including the Fourth and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(Filed Friday, June 5, 1998)

90,502 Sofia E. Fowler v. The Board of County Commissioners of Pottawatomie County, Oklahoma.
Certiorari denied.
CONCUR: Hodges, Lavender, Simms, Hargrave, Opala, JJ.
DISSENT: Kauger, C.J., Summers, V.C.J., Wilson, Watt, JJ.

/s/ Yvonne Kauger
CHIEF JUSTICE

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SOFIA E. FOWLER, Appellant, v. THE BOARD OF COUNTY COMMISSIONERS OF POTTAWATOMIE COUNTY, OKLAHOMA, Appellee, DEPUTY SHERIFF CHRIS HURLEY and DEPUTY SHERIFF MICHAEL FOWLER, EMPLOYEES OF THE POTTAWATOMIE COUNTY SHERIFF'S DEPARTMENT, Defendants.	)	No. 90,502 (Filed Jun. 5, 1998)

ALMA WILSON, J., dissenting to denial of petition for writ of certiorari:

This governmental tort claim arises out of shocking incidences of abusive use of the police power. Sofia Fowler, plaintiff below (appellant), and her husband were in the process of securing a divorce. The Fowler's [sic] two children were residing with appellant. To secure advantage in the custody dispute, appellant's husband engaged the assistance [sic] his brother, a deputy sheriff for Pottawatomie County. On one occasion sheriff officers staked out appellant's home and, upon a tip from her estranged husband, they followed her car and pulled her over for no cause. It was the middle of the night and

appellant was alone when the officers stopped her. The officers forced her to get out of the car to take a sobriety test, even though she admittedly showed no symptoms of being impaired. While being detained on a deserted road, the officers searched her car and found something that resembled drugs in the truck just as her estranged husband had told the officers they would find. The officers, however, did not take appellant into custody.

The trial court dismissed appellant's governmental tort claim on summary judgment. In affirming the summary judgment, the Court of Civil Appeals concluded that the county is immune from liability under 51 O.S.Supp.1994, § 155(6) and *Schmidt v. Grady County*, 1997 OK 92, 943 P.2d 595; and, that 21 O.S.1991, § 535 is not applicable under *Overall v. State ex rel. Department of Public Safety*, 1995 OK CIV APP 107, 910 P.2d 1087.

Title 51 O.S.Supp.1994, § 155(6) provides:

> The state or a political subdivision shall not be liable if a loss or claim results from:
>
> 6. Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection.

Title 21 O.S.1991, § 535 provides:

> Any public officer or person pretending to be a public officer, who under the pretense or color of any process or other legal authority, arrests any person, or detains him against his will, or seizes or levies upon any property, or dispossesses anyone of any lands or tenements without due and legal process is guilty of a misdemeanor.

Appellant's action does not arise out of the "method of providing law enforcement." It arises out of incidences of alleged abuse of police power. In particular, it arises out of the alleged incidence where appellant was allegedly being detained "without due and legal process." This cause involves questions of fact, as well as questions of law. Summary adjudication is not proper. Further, it presents a first impression question of law: Should 51 O.S.Supp.1994, § 155(6) be read in pari materia with 21 O.S.1991, § 535. Accordingly, I respectfully dissent to the denial of certiorari review.

NOT FOR PUBLICATION
IN THE COURT OF CIVIL APPEALS OF THE
STATE OF OKLAHOMA

DIVISION I

SOFIA E. FOWLER, Plaintiff/Appellant, vs. THE BOARD OF COUNTY COMMISSIONERS OF POTTAWATOMIE COUNTY, Defendant/Appellee, Deputy Sheriff Chris Hurley and Deputy Sheriff Michael Fowler, employees of the Pottawatomie County Sheriff's Department, Defendants.	)	No. 90,502

APPEAL FROM THE DISTRICT COURT OF
POTTAWATOMIE COUNTY, OKLAHOMA

HONORABLE GLENN DALE CARTER,
DISTRICT JUDGE

AFFIRMED

(Filed March 20, 1998)

Alfred M. Parsons,
Marianne Miller,
Tanya L. Roland,
Shawnee, Oklahoma, For Plaintiff/Appellant,

Jason C. Wagner,
Oklahoma City, Oklahoma, For Defendant/Appellee.

MEMORANDUM OPINION

Carl B. Jones, Vice-Chief Judge:

Early in the morning of March 16, 1996, Plaintiff/Appellant Sofia Fowler was stopped by reserve Deputy Chris Hurley of the Pottawatomie County Sheriff's Department because one of the taillights was out on her car. In the course of the stop, the deputy gave Sofia a field sobriety test and also, with Sofia's consent, searched the car. A bag containing what appeared to be drugs was discovered in the trunk. In fact, Deputy Hurley knew there might be illegal drugs in the trunk, because he had searched the trunk of the car earlier that night and he had put the bag containing the suspected drugs back where he had found it next to the spare tire. All this notwithstanding, based upon what he knew about events leading up to the stop, and upon Sofia's demeanor during the stop, Deputy Hurley concluded that there was no reason to arrest Sofia, and so let her go.

As was revealed later, the stop on March 15 was the culmination of a strange series of events which began several days earlier. On March 6, 1996, Sofia's husband David filed for divorce and sought custody of the couple's two young children. By that time, Sofia and David were having apart, and the children usually stayed with her. On March 10, David had called a highway patrol trooper and said that Sofia had drugs in her trunk. The trooper had located her home, waited for her to leave, followed her, and watched after she pulled into a nearby convenience store. Sofia apparently had noticed the trooper's actions, called troop headquarters, said her husband's brother was a deputy sheriff and that she was in

the midst of a divorce action, and asked why the highway patrol was watching her. After the trooper learned this from his dispatcher he returned to his regular patrol, but shortly thereafter Deputy Fowler (driving his personal vehicle) pulled up behind the trooper, got the trooper to pull over, identified himself as a reserve deputy, and told the trooper that Sofia "was probably doing drugs and that she needed to be caught." The trooper explained what had happened earlier, and declined to pursue the matter further.

On March 12, David had contacted another deputy sheriff in the county (not one of the defendants here) and repeated the same allegations about Sofia, that she was doing drugs and had drugs in her car. David wanted someone to find the drugs and "then take the children away from her." That deputy told David that his statement alone was insufficient cause to stop Sofia and search her car.

Even before David filed for divorce, he had tried to persuade Deputy Hurley that Sofia was using drugs, and that she should be stopped while driving and her car searched. Deputy Hurley told David the first time they talked that there needed to be probable cause for any stop. On March 11, David had called Deputy Hurley again to say that Sofia was coming to pick up the children, and "my [i.e., Hurley's] probable cause would be a non-working right rear [tail]light."

On March 15, several hours before Sofia was stopped, David called Deputy Hurley a third time, saying he had found a spare key to Sofia's car. David asked Hurley to go through the car with Deputy Fowler while he and

Sofia were out to dinner that night. Deputy Fowler called Deputy Hurley later and said he had got the spare key from David and also David's consent to search the car, that he had searched the car once but didn't find anything, but he had subsequently searched the car again and found what he suspected was marijuana, a pipe, and some pills in a bag in the trunk. Deputy Hurley then met Deputy Fowler at the vehicle and confirmed those findings. The deputies put the bag back in the trunk.

Deputy Hurley's report (from which we have extracted many of the preceding facts) indicated that Deputy Fowler told him David would be calling to find out what was found in the search. Deputy Hurley told Deputy Fowler to tell David to get in touch when he and Sofia returned from dinner. At approximately 1:25 a.m., David called to tell the deputies that Sofia was in her car, southbound on a local state highway, and apparently also advised them that she had been drinking. Deputy Hurley then proceeded to find Sofia's car, follow it, and stop her, with the results as set out at the beginning of this opinion.

Sofia sued Pottawatomie County and the two deputies, Hurley and Fowler. She alleged that she had been stopped without probable cause and falsely imprisoned, that her privacy had been invaded by an illegal search of her vehicle, that the defendants violated 21 O.S. 1991 § 535[1] and Okla. Const.,

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[1] Section 535 provides:

"Every public officer or person pretending to be a public officer, who under the pretense or color of any

art. II § 30,[2] and that the defendant deputies had not been properly trained or supervised. The case initially was removed to federal court, but was remanded after Sofia denied asserting any federal law claim. Sofia also dismissed the two deputies, and her case below was reduced to one against Pottawatomie County [hereafter "County"].

County moved for summary judgment, asserting it was immune from liability under the Governmental Tort Claims Act, 51 O.S.Supp.1994 § 155(6), which exempts from the waiver of liability of governmental subdivisions any liability for a loss or claim resulting, *inter alia*, from "the failure to provide, or the method of providing, police, law enforcement or fire protection." County cited as dispositive on that point the opinion of the Oklahoma Supreme Court in ***Schmidt v. Grady County***, 1997 OK 92, 943 P.2d 595.

Sofia disputed whether ***Schmidt*** was really dispositive of her claims against County. She offered a somewhat narrower reading of that case. In ***Schmidt***, the majority rejected full immunization of law enforcement officers for all negligent acts committed within the scope of their employment but read that case as immunizing officers and also their employer from liability for negligent acts

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process or other legal authority, arrests any person, or detains him against his will, or seizes or levies upon any property, or dispossesses anyone of any lands or tenements without due and legal process, is guilty of a misdemeanor."

[2] The cited section is a state constitutional analogue to the Fourth Amendment to the U. S. Constitution.

they committed *as law enforcement officers*. The court distinguished negligent acts by law enforcement officers *acting in that capacity* from negligent acts they commit in no way different from negligent acts by private citizens. ***Schmidt,*** 1997 OK 92 at ¶¶ 11-14, 943 P.2d at 598. The dissenting justices would have read the "method of providing" language in § 155(6) more narrowly, to mean only those policy decisions by the governmental unit in charge of providing police, law enforcement or fire protection. *Id.*, 1997 OK 92 at ¶¶ 2-3, 943 P.2d at 598-99. It is this latter, narrower, view that Sofia proffered in her response to County's motion.

There is no dispute here that all of the acts by the deputies were performed in their capacity as law enforcement officers. Sofia does not allege that any of those acts were outside the scope of their employment with County. We follow the holding of ***Schmidt,*** that they are immunized from liability for any tortious acts they may have committed. Clearly also, even under the narrow reading of ***Schmidt,*** County officials would be immunized from tort liability for any negligent training or supervision of the deputies.

Sofia's statutory claim under 21 O.S. 1991 § 535 must also fail. "Due and legal process" as used in § 535 means the same thing as probable cause. ***Overall v. State ex rel Dept. of Public Safety,*** 1995 OK CIV APP 107, ¶ 24, 910 P.2d 1087, 1091, *cert. denied*. Sofia was not arrested, and the undisputed record shows that Deputy Hurley bad probable cause to stop her for a burned out taillight. The deputy also had an obligation to determine whether Sofia was impaired by alcohol. Not every traffic stop amounts to a detention of the driver against her will. The critical

inquiry is whether probable cause existed. Unquestionably, it did. And, because she gave her consent to the search of her car, there was no unreasonable search or seizure within the meaning of Okla.Const., art. II, § 30.

We therefore hold that the judgment rendered in favor of County must be affirmed.

AFFIRMED.

JOPLIN, P.J. and GARRETT, J., concur.

IN THE DISTRICT COURT OF THE TWENTY-THIRD JUDICIAL DISTRICT SITTING WITHIN AND FOR POTTAWATOMIE COUNTY STATE OF OKLAHOMA

SOFIA E. FOWLER, Plaintiff, vs. THE BOARD OF COUNTY COMMISSIONERS OF POTTAWATOMIE COUNTY, OKLAHOMA, DEPUTY SHERIFF CHRIS HURLEY and DEPUTY SHERIFF MICHAEL FOWLER, EMPLOYEES OF THE POTTAWATOMIE COUNTY SHERIFF'S DEPARTMENT, Defendants.	]]]]]]]]]]]]	No. C-97-195 (Filed Nov. 12, 1997)

ORDER

NOW, on this 16th day of October, 1997, the above styled and numbered cause comes on for hearing upon Defendant Board's Motion for Summary Judgment. Plaintiff appeared by and through her Attorney of Record, Marianne Miller of The Parsons Law Firm, P.L.L.C., and Defendant Board appeared by and through its Attorney Jason C. Wagner of Collins, Zorn, Jones & Wagner, P.C.

The Court, having reviewed the file and record herein, having read briefs submitted by the parties, heard argument of Counsel and being fully advised in the premises finds that Defendant Board's Motion for Summary Judgment should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Defendant Board's Motion for Summary Judgment be and hereby is sustained and the above styled and numbered cause is hereby dismissed with prejudice.

/s/ Glenn Dale Carter
GLENN DALE CARTER
JUDGE OF THE
DISTRICT COURT

CERTIFICATE OF TRUE COPY

STATE OF OKLAHOMA)
) ss: in the **Dist. Court**
Pottawatomie County)

I, Cecil Dunlap, Court Clerk, Within and for the State and County aforesaid do hereby certify that the above foregoing is a full, true, correct and complete copy of Order in the above cause as fully as the same appears on record and on file in my office.

WITNESS my hand as Clerk and official seal this 18 day of Nov 1997

CECIL DUNLAP, Court Clerk

By /s/ Rita Head Deputy

U.S.C.A. Const. Amend. IV – Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.C.A. AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oklahoma Constitution, Article II, § 19. Trial by jury

The right of trial by jury shall be and remain inviolate, except in civil cases wherein the amount in controversy does not exceed One Thousand Five Hundred Dollars ($1,500.00), or in criminal cases wherein punishment for the offense charged is by fine only, not exceeding One Thousand Five Hundred Dollars ($1,500.00). Provided, however, that the Legislature may provide for jury trial in cases involving lesser amounts. Juries for the trial of civil cases, involving more than Ten Thousand Dollars ($10,000.00), and felony criminal cases shall consist of twelve (12) persons. All other juries shall consist of six (6) persons. However, in all cases the parties may agree on a lesser number of jurors than provided herein.

In all criminal cases where imprisonment for more than six (6) months is authorized the entire number of jurors must concur to render a verdict. In all other cases three-fourths (3/4) of the whole number of jurors concurring shall have power to render a verdict. When a verdict is rendered by less than the whole number of jurors, the verdict shall be signed by each juror concurring therein.

Amended by State Question No. 623, Legislative Referendum No. 277, adopted at election held on Aug. 28, 1990.

Oklahoma Constitution, Article II, § 30. Unreasonable searches or seizures – Warrants, issuance of

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches

or seizures shall not be violated; and no Warrants shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized.

UNITED STATES CODE ANNOTATED
TITLE 28, JUDICIARY AND JUDICIAL PROCEDURE
PART VI – PARTICULAR PROCEEDINGS
CHAPTER 171 – TORT CLAIMS PROCEDURE

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States

whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

UNITED STATES CODE ANNOTATED
TITLE 28, JUDICIARY AND JUDICIAL PROCEDURE
PART VI – PARTICULAR PROCEEDINGS
CHAPTER 171 – TORT CLAIMS PROCEDURE

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within

the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government –

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of

this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of > Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if –

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

510.5. O.S. § 151. Short title

This act[1] shall be known and may be cited as "The Governmental Tort Claims Act."

Laws 1978, c. 203, § 1, eff. July 1, 1978. Laws 1984, c. 226, § 1, eff. Oct. 1, 1985.

510.5. O.S. § 152.1. Sovereign Immunity

A. The State of Oklahoma does hereby adopt the doctrine of sovereign immunity. The state, its political subdivisions, and all of their employees acting within the scope of their employment, whether performing governmental or proprietary functions, shall be immune from liability for torts.

B. The state, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions. In so waiving immunity, it is not

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[1] Section 151 et seq. of this title.

the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution.

Laws 1984, c. 226, § 3, eff. Oct. 1, 1985.

510.5. O.S. § 153. Liability – Scope – Exemptions – Exclusivity

A. The state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment subject to the limitations and exceptions specified in this act and only where the state or political subdivision, if a private person or entity, would be liable for money damages under the laws of this state. The state or a political subdivision shall not be liable under the provisions of this act for any act or omission of an employee acting outside the scope of his employment.

B. The liability of the state or political subdivision under this act shall be exclusive and in place of all other liability of the state, a political subdivision or employee at common law or otherwise. Laws 1978, c. 203, § 3, eff. July 1, 1978. Laws 1984, c. 226, § 4, eff. Oct. 1, 1985; Laws 1984, c. 228, § 2, eff. July 1, 1984.

510.5. O.S. Supplement § 155. Exemptions from liability

The state or a political subdivision shall not be liable if a loss or claim results from:

1. Legislative functions;

2. Judicial, quasi-judicial, or prosecutorial functions;

3. Execution or enforcement of the lawful orders of any court;

4. Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy;

5. Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees;

6. Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection;

7. Any claim based on the theory of attractive nuisance;

8. Snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the state or a political subdivision;

9. Entry upon any property where that entry is expressly or impliedly authorized by law;

10. Natural conditions of property of the state or political subdivision;

11. Assessment or collection of taxes or special assessments, license or registration fees, or other fees or charges imposed by law;

12. Licensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority;

13. Inspection powers or functions, including failure to make an inspection, review or approval, or making an inadequate or negligent inspection, review or approval of any property, real or personal, to determine whether the property complies with or violates any law or contains a hazard to health or safety, or fails to conform to a recognized standard;

14. Any loss to any person covered by any workers' compensation act or any employer's liability act;

15. Absence, condition, location or malfunction of any traffic or road sign, signal or warning device unless the absence, condition, location or malfunction is not corrected by the state or political subdivision responsible within a reasonable time after actual or constructive notice or the removal or destruction of such signs, signals or warning devices by third parties, action of weather elements or as a result of traffic collision except on failure of the state or political subdivision to correct the same within a reasonable time after actual or constructive notice. Nothing herein shall give rise to liability arising

from the failure of the state or any political subdivision to initially place any of the above signs, signals or warning devices. The signs, signals and warning devices referred to herein are those used in connection with hazards normally connected with the use of roadways or public ways and do not apply to the duty to warn of special defects such as excavations or roadway obstructions;

16. Any claim which is limited or barred by any other law;

17. Misrepresentation, if unintentional;

18. An act or omission of an independent contractor or consultant or his employees, agents, subcontractors or suppliers or of a person other than an employee of the state or political subdivision at the time the act or omission occurred;

19. Theft by a third person of money in the custody of an employee unless the loss was sustained because of the negligence or wrongful act or omission of the employee;

20. Participation in or practice for any interscholastic or other athletic contest sponsored or conducted by or on the property of the state or a political subdivision;

21. Participation in any activity approved by a local board of education and held within a building or on the grounds of the school district served by that local board of education before or after normal school hours or on weekends;

22. Any court-ordered or Department of Corrections approved work release program; provided, however, this provision shall not apply to claims from

individuals not in the custody of the Department of Corrections based on accidents involving motor vehicles owned or operated by the Department of Corrections;

23. The activities of the National Guard, the militia or other military organization administered by the Military Department of the state when on duty pursuant to the lawful orders of competent authority:

a. in an effort to quell a riot,

b. in response to a natural disaster or military attack, or

c. if participating in a military mentor program ordered by the court;

24. Provision, equipping, operation or maintenance of any prison, jail or correctional facility, or injuries resulting from the parole or escape of a prisoner or injuries by a prisoner to any other prisoner, provided, however, this provision shall not apply to claims from individuals not in the custody of the Department of Corrections based on accidents involving motor vehicles owned or operated by the Department of Corrections;

25. Provision, equipping, operation or maintenance of any juvenile detention facility, or injuries resulting from the escape of a juvenile detainee, or injuries by a juvenile detainee to any other juvenile detainee;

26. Any claim or action based on the theory of manufacturer's products liability or breach of warranty, either expressed or implied;

27. Any claim or action based on the theory of indemnification or subrogation;

28. Any claim based upon an act or omission of an employee in the placement of children;

29. Acts or omissions done in conformance with then current recognized standards;

30. Maintenance of the state highway system or any portion thereof unless the claimant presents evidence which establishes either that the state failed to warn of the unsafe condition or that the loss would not have occurred but for a negligent affirmative act of the state; or

31. Any confirmation of the existence or nonexistence of any effective financing statement on file in the office of the Secretary of State made in good faith by an employee of the office of the Secretary of State as required by the provisions of Section 9-307.6 of Title 12A of the Oklahoma Statutes.

Amended by Laws 1988, c. 134, § 4, emerg. eff. April 19, 1988; Laws 1988, c. 241, § 2, eff. Nov. 1, 1988; Laws 1991, c. 55, § 2, eff. Sept. 1, 1991; Laws 1994, c. 290, § 60, eff. July 1, 1994.

IN THE DISTRICT COURT OF THE TWENTY-THIRD JUDICIAL DISTRICT SITTING WITHIN AND FOR POTTAWATOMIE COUNTY STATE OF OKLAHOMA

SOFIA E. FOWLER, Plaintiff, -vs- THE BOARD OF COUNTY COMMISSIONERS OF POTTAWATOMIE COUNTY, OKLAHOMA, DEPUTY SHERIFF CHRIS HURLEY and DEPUTY SHERIFF MICHAEL FOWLER, EMPLOYEES OF THE POTTAWATOMIE COUNTY SHERIFF'S DEPARTMENT, Defendants.	)	No. C-97-195

* * *

DEPOSITION OF CHRIS HURLEY
TAKEN ON BEHALF OF THE PLAINTIFF
IN SHAWNEE, OKLAHOMA
ON AUGUST 12, 1997

CHRIS HURLEY
8-12-97

* * *

[p. 100] A I was called into – down to the Sheriff's Office by the Sheriff, Weldon Cantrell. Apparently, he had been contacted, from what I understand, by her or her attorney in reference to this. He was very irate and upset about the situation, claimed that I left the county wide

open for a lawsuit, that I had gone beyond the scope of my authority and made some illegal searches.

At that point in time, he – his tone of voice and his loudness of his voice was not to my liking. I advised him that I wasn't going to talk to him unless he lowered his voice. Warren Boles was present, also. They conversed a little bit about the situation.

At that point in time, by the Sheriff, I was suspended until further notification.

Q Are you still suspended?

A To my knowledge. I have not been advised otherwise.

Q Have you sought any administrative relief trying to get your job back?

A Yes, ma'am.

Q When did you do this?

A Several times during 1996.

Q Who did you apply for relief with?

* * *

IN THE DISTRICT COURT OF THE TWENTY-THIRD JUDICIAL DISTRICT SITTING WITHIN AND FOR POTTAWATOMIE COUNTY STATE OF OKLAHOMA

SOFIA E. FOWLER, Plaintiff, -vs- THE BOARD OF COUNTY COMMISSIONERS OF POTTAWATOMIE COUNTY, OKLAHOMA, DEPUTY SHERIFF CHRIS HURLEY and DEPUTY SHERIFF MICHAEL FOWLER, EMPLOYEES OF THE POTTAWATOMIE COUNTY SHERIFF'S DEPARTMENT, Defendants.	)	No. C-97-195

* * *

DEPOSITION OF MICHAEL FOWLER
TAKEN ON BEHALF OF THE PLAINTIFF
IN SHAWNEE, OKLAHOMA
ON AUGUST 12, 1997

* * *

[p. 47] A I think we did briefly maybe.

Q When?

A After he called me in after my commission was pulled.

Q After your what?

A After my commission was pulled.

Q What did you discuss?

A Same thing we've discussed here as far as the search.

Q What did the Sheriff tell you relating to the search.

A I don't recall exactly what all was said or anything.

Q Well, did he give you a reason for suspending you?

A Just said illegal search.

Q That was after you told him what had happened?

A Yes.

Q You had given him your version of what had happened?

A Yes, ma'am.

Q Now, as far as the verbal – you say the verbal consent to search that you received from your brother, you didn't do any verification that he was,

* * *

Supreme Court, U.S.
FILED
SEP 30 1998
OFFICE OF THE CLERK

No. 98-372

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

SOFIA E. FOWLER,

Petitioner,

vs.

THE BOARD OF COUNTY COMMISSIONERS
OF POTTWATOMIE COUNTY, OKLAHOMA,

Respondents.

On Petition for a Writ of Certiorari
To The Oklahoma Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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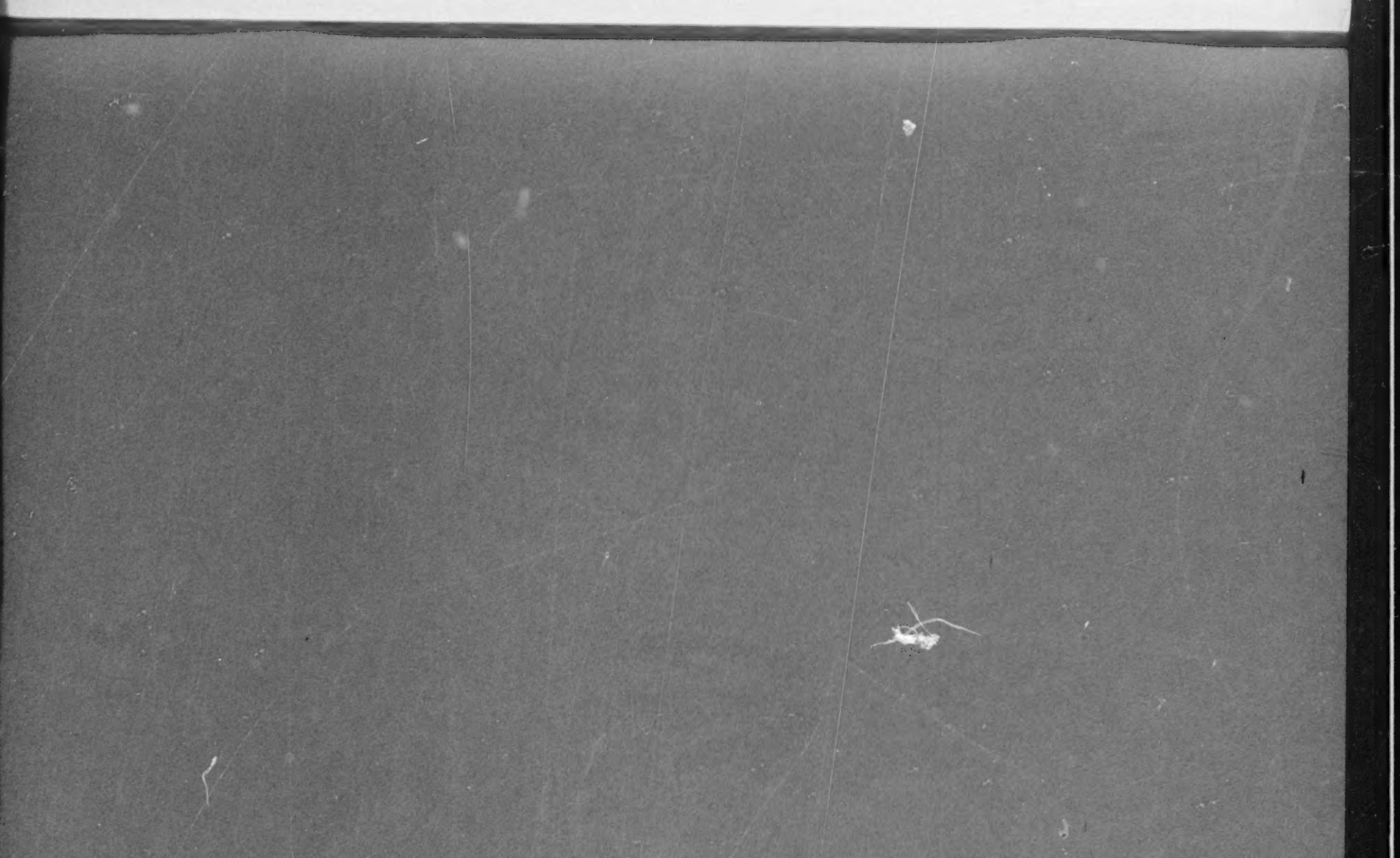

QUESTIONS PRESENTED

Petitioner has presented two questions on appeal to the Court. Respondent is dissatisfied with the questions presented by Petitioner due to the fact that neither question is reviewable by the Court in this matter. The sole issue to be presented is not whether the Oklahoma Supreme Court erred, but whether the United States Supreme Court may review a decision of a state court that is based solely and independently upon state law. As evident from the argument contained herein, the Court clearly may not.

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CONSTITUTIONAL PROVISIONS

Petitioner claims the Court has jurisdiction in this matter pursuant to 23 U.S.C. § 1257 (a). Title 23 of the United States Code does not contain a section 1257. Indeed, title 23, itself, is concerned with highways and not jurisdiction. Respondent assumes that Petitioner claims jurisdiction under 28 U.S.C. § 1257 (a). In any event, as further evidenced through the argument herein, neither title 23 nor title 28 can overcome the overwhelming fact that the Oklahoma Supreme Court did not decide a question of, nor base its decision on, federal law.

The other United States Code provisions cited by Petitioner, 28 U.S.C. §§ 2674 and 2679, relate to the Federal Tort Claims Act. Respondent is dissatisfied with Petitioner's reference to the Federal Tort Claims Act as it does not apply and is not proper for persuasive support.

STATEMENT OF THE CASE

Petitioner has filed her Petition for Writ of Certiorari in an attempt to gain this Court's review of an issue decided on purely state law grounds. The cause was originally filed in state court, but later removed to the United States District Court for the Western District of Oklahoma by Respondent. After Petitioner argued to have the matter remanded alleging no federal jurisdiction, this case was remanded to state court by the United States District Court for the Western District of Oklahoma. After remand, the case was summarily disposed of by the state district court. This disposition was affirmed by the Court of Civil Appeals and subsequently the Oklahoma Supreme Court denied certiorari.

ARGUMENT

There is plainly no cause for the Court's review of this matter. Petitioner presents two propositions in her Petition, neither of which correctly support her argument for review. The state district court's opinion solely rested upon state law. Petitioner's attempt to disguise this fact fails in every respect. Petitioner's barrage of federal case law and statutes are

inadequate to bring this matter within the Considerations Governing Review on Writ of Certiorari in Rule 10 of the United States Supreme Court Rules.

A. Petitioner's propositions fail to overcome the fact that the Oklahoma Supreme Court's decision was based solely and independently upon state law.

Rule 10 of the United States Supreme Court Rules provides three situations in which a petition for writ of certiorari will be granted. The first situation, (a), is clearly inapplicable because a United States court of appeals has not rendered a decision in this case. The other situations are also inapplicable due to the fact that no important federal questions have been decided (although, the three situations listed in Rule 10 "neither control[ ] nor fully measure[e] the Court's discretion." U. S. S. Ct. R. 10.).

The United States Supreme Court has had occasion to address situations in which review is sought of a state court decision. In Braxton v. U.S., 500 U.S. 344, 347, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385 (1991), the Court stated the main purpose for using certiorari jurisdiction "is to resolve

conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." The Court in Leavitt v. Jane L., 116 S. Ct. 2068, 2072, 135 L. Ed. 2d 443 (1996), stated, "we do not ordinarily grant petitions for certiorari solely to review what purports to be an application of state law." The Court in Leavitt further suggested that petitions for certiorari should be granted "where the alternative is allowing blatant federal-court nullification of state law." Leavitt at 2072. This Court has set forth specific requirements for reviewing state court judgments when no federal court has been involved. Such review may only be entertained when the state court bases its decision on federal law. Illinois v. Rodriguez, 497 U.S. 177, 182, 110 S. Ct. 2793, 2798, 111 L. Ed. 2d 148 (1990). Even still, the decision must have been dependent on federal law and not independently supported by state law:

> In Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553, 115 L. Ed. 2d 640 (1991), we reaffirmed that this Court "will not review a question of federal law decided by a state court if the decision of that court

> rests on a state law ground that is independent of the federal question and adequate to support the judgment." . . . We in fact lack jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory.

Lambrix v. Singletary, 117 S. Ct. 1517, 1522 (1997) (citing Herb v. Pitcairn, 324 U.S. 117, 125-26, 65 S. Ct. 459, 462-64, 89 L. Ed. 2d 789 (1945)). This rule requiring a decision dependent upon a federal question "applies whether the state law ground is substantive or procedural." Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54, 115 L. Ed. 2d 640 (1991).

The Supreme Court's justification for not reviewing decisions of state law have also been expressed in the opinions addressing certiorari review. In Michigan v. Long, 463 U.S. 1032, 1039, 103 S. Ct. 3469, 3475, 77 L. Ed. 2d 1201 (1983), the Court reasoned, "[t]he process of examining state law is unsatisfactory because it requires us to interpret state laws with

which we are generally unfamiliar." Further, the Court in Schad v. Arizona, 501 U.S. 624, 636, 111 S. Ct. 2491, 2499, 115 L. Ed. 2d 555 (1991), referred to the "fundamental principle that we are not free to substitute our own interpretations of state statutes for those of a state's courts." Neither the principles behind certiorari review, nor the applicable rules that govern the Supreme Court's appellate jurisdiction provide support for Petitioner's position.

Petitioner presents two reasons for granting certiorari in this matter. Petitioner's first proposition states that the Oklahoma Supreme Court unconstitutionally applied the Governmental Tort Claims Act in a way conflicting with decisions of this Court. In her second proposition, which is necessarily related to the first, Petitioner states that the Oklahoma Supreme Court has determined that Petitioner is not entitled to certain constitutional rights. Petitioner cannot, facially, create a federal question which does not actually exist.

1. Petitioner's first proposition fails to support her Petition for Writ of Certiorari.

In her first proposition, Petitioner, through Subproposition 1A and 1B, claims that the Oklahoma Supreme Court unconstitutionally applied the Oklahoma Governmental Tort Claims Act. Petitioner first alleges that § 155 (6) of the Oklahoma Governmental Tort Claims Act, Okla. Stat. tit. 51, § 151 et seq., does not apply to the deputies' conduct. Furthermore, Petitioner apparently attempts to create a federal question by comparing the Oklahoma Governmental Tort Claims Act and the Federal Tort Claims Act. As Petitioner's Subproposition 1A clearly questions the Oklahoma Supreme Court's interpretation of a state statute and the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., has no application to the matter presently before the Court, Petitioner's proposition fails to support her Petition for Certiorari Review.

The Oklahoma Supreme Court, by denying review of Petitioner's cause, affirmed the lower court's decision regarding application of a state statute. The decisions of the Oklahoma Supreme Court, Oklahoma Court of Civil Appeals and Pottawatomie County District Court involved purely state law; specifically, the decisions involved an application and

interpretation of Okla. Stat. tit. 51, § 155 (6). Pursuant to Schad v. Arizona, 501 U.S. at 636, 111 S. Ct. at 2499, the interpretation of state law is left to the state courts. Petitioner's Subproposition 1A fails in this respect.

Petitioner's Subproposition 1B claims that the Oklahoma Supreme Court failed to follow the standard for determining liability of non-exempted acts. The Oklahoma Supreme Court, in essence, determined that the Defendants/Respondents were not liable due to the exemption contained in § 155 (6) of the Oklahoma Governmental Tort Claims Act. This proposition must also fail due to the fact that the issues decided by the Oklahoma Supreme Court were based upon purely state law. Petitioner further attempts to overcome this fact by comparing the Federal Tort Claims Act and case law interpreting the Federal Act.

The Oklahoma Governmental Tort Claims Act has no connection with the Federal Tort Claims Act, outside of the basic purpose behind the acts' enactments. The Federal Tort Claims Act applies to acts or conduct relating to federal agencies. See generally 28 U.S.C. § 2671. The Oklahoma

Governmental Tort Claims Act provides for liability and exemptions from liability to state or political subdivisions. Okla. Stat. tit. 51, § 153. It is clearly unnecessary to conduct an examination into which act applies in our situation. Any discussion of the Federal Tort Claims Act in the matter presently before the Court would be ineffectual.

Petitioners have presented case law and statutory provisions relating to the Federal Governmental Tort Claims Act for persuasive support. However, they have not pointed to any provisions of the Federal Tort Claims Act that are similar to § 155 (6) of the Oklahoma Governmental Tort Claims Act. As such, it can hardly be argued that any interpretation of § 155 (6) of the Oklahoma Governmental Tort Claims Act will affect the Federal Tort Claims Act. Petitioner's interjection of the Federal Tort Claims Act in this matter is inappropriate.

Petitioner's first proposition only emphasizes Respondent's point, i.e., there are no federal issues on which this matter was decided. The responsibility of interpreting state law is left to the state courts. Section 155 (6) of the Oklahoma Governmental Tort Claims Act is such a state law. Whether the

Oklahoma Supreme Court's decision is contrary to the Federal Tort Claims Act is irrelevant. The Federal Tort Claims Act does not apply, nor does it contain a provision parallel to Section 155 (6).

2. Petitioner's second proposition is untimely, especially in light of the fact that she abandoned any federal claims in her argument to remand.

In her second proposition, Petitioner claims that she was denied certain constitutional rights by the Oklahoma Supreme Court. This proposition is completely without merit. Indeed, Petitioner completely abandoned any equal protection or Fourth Amendment claim when she vigorously argued that the matter be remanded to state court[1], Petitioner's assertion of a federal issue is not timely and, similarly, should be denied.

---

[1]In Petitioner's Motion to Remand and Brief, she argued that her cause of action arose under the Oklahoma Constitution and Oklahoma law. Petitioner further claimed, "There are no separate or independent claims that are removable if sued upon alone." (A. 1, Motion to Remand and Brief). A fact recognized by the Oklahoma Court of Civil Appeals in its Memorandum Opinion affirming the state district court's grant of summary judgment.

In Adams v. Robertson, 117 S. Ct. 1028, 1029 (1997), this Court noted:

> [W]e have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Furthermore, the Court stated, "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented." Adams at 1029. Petitioner bears the burden of overcoming this assumption. Id. In this respect, Petitioner has failed.

Petitioner specifically alleged that the issues in this matter relate to state statutes and state concerns. Petitioner is now attempting to gain review by the United States Supreme Court of a decision by the Oklahoma Supreme Court regarding the interpretation of state law- an attempt contrary to the United States Supreme Court Rules and opinions. See Monks v. New Jersey, 398 U.S. 71, 90 S. Ct. 1563, 26 L. Ed. 2d 54 (1970) (petitioner could not raise issue of unconstitutional application

of state statute for the first time on writ of certiorari when state court had no opportunity to pass upon it). Thus, Petitioner's Petition for Certiorari must fail.

Additionally, the fact that this matter does not involve any federal issues is curiously emphasized in reference to Rule 14 of the Rules of the Supreme Court. Rule 14(1)(g)(i) requires that the Petitioner, in seeking review of a state court judgment, reference "when the federal questions sought to be reviewed were raised." In this case, Petitioner has failed to address this requirement in her Statement of the Case and Appendix (U. S. S. Ct. R. 14(1)(i)(v)). Indeed, as previously noted, Petitioner completely abandoned any federal claims and, thus, cannot not fulfill this requirement.

Petitioner's second proposition is untimely. Petitioner has blatantly attempted to urge federal issues that she expressly abandoned at the trial court level. The Oklahoma Supreme Court did not make its decision on any federal grounds. Petitioner is simply left with a decision by the highest state court that rests, independently, on an interpretation of state law.

CONCLUSION

As evident in the record, and specifically noted in the Court of Civil Appeals' opinion, this case involves a question of state law regarding Okla. Stat. tit. 51, § 155 (6). Furthermore, any federal questions presented by Petitioner have no effect on the state court's decision. See Int'l Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986) (Supreme Court has no authority to review state determinations of purely state law, nor may it review federal issues that can have no effect on state court's judgment). Neither of Petitioner's propositions support her claim to the contrary. For the reasons given above, Petitioner's Petition for Writ of Certiorari should be denied.

Dated: September 28, 1998

Respectfully submitted,

Gayla I. Jones

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CERTIFICATE OF SERVICE

The undersigned, to be admitted to practice before the Supreme Court of the United States effective August 7, 1998 hereby certifies that on September 29, 1998, three copies of the foregoing Brief in Opposition were served, by certified mail, postage prepaid, to the following counsel of record for Petitioner:

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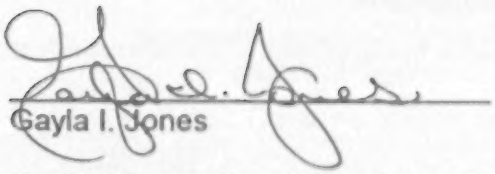

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APPENDIX

Motion to Remand and Brief, Filed on May 15, 1997. . . . . A.1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

SOFIA E. FOWLER, Plaintiff,	)	
vs.	)	No. CIV-97-0750 M
THE BOARD OF COUNTY COMMISSIONERS OF POTTAWATOMIE COUNTY, OKLAHOMA, DEPUTY SHERIFF CHRIS HURLEY AND DEPUTY SHERIFF MICHAEL FOWLER, EMPLOYEES OF THE POTTAWATOMIE COUNTY SHERIFF'S DEPARTMENT, Defendants.	)	(Filed May 15, 1997)

MOTION TO REMAND AND BRIEF

Plaintiff moves for an Order remanding this cause to the District Court of the Twenty-Third Judicial District, Pottawatomie County, Oklahoma, and in support of this motion states as follows:

1. Defendants, on May 6, 1997, filed their Notice and Petition of Removal of this cause from the ~~District Court~~ of the Twenty-Third Judicial District, Pottawatomie County, Oklahoma.

2. In their Notice and Petition for Removal, Defendants stated that this cause arose under the Constitution, laws, or

treaties of the United States.

3. The Defendants alleged that this cause of action was removable to the Federal District Court under the provisions of 28 U.S.C. § 1441 et seq.

4. This cause of action is not subject to the original jurisdiction of the Federal District Court under the provisions of 28 U.S.C. § 1331, because the Plaintiff's causes of action arose under the Oklahoma Constitution and laws.

5. There are no separate or independent claims that are removable if sued upon alone.

6. Further, based on the foregoing this cause was therefore improperly removed to this Court and should be remanded to the District Court of the Twenty-Third Judicial District, Pottawatomie County, Oklahoma.

WHEREFORE, Plaintiff SOFIA E. FOWLER, prays for an Order from this Court remanding Plaintiff's causes of action to the District Court of the Twenty-Third Judicial District, Pottawatomie County, Oklahoma for further proceedings and an Order awarding Plaintiff costs incurred in this Court by reason of the removal.

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